Supreme Court, U.S.
FILED
JUL 24 1998
OFFICE OF THE CLERK

No. 97-1472

In the Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL A. HADDLE, PETITIONER

v.

JEANETTE G. GARRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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44 pp

QUESTION PRESENTED

Whether an at-will employee who alleges that he was dismissed from his employment in furtherance of a conspiracy to retaliate against him for his appearance in federal court and to deter him and others from testifying in subsequent federal court proceedings states a valid claim for damages under the Civil Rights Act of 1871, 42 U.S.C. 1985(2) and (3).

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INTEREST OF THE UNITED STATES

This case presents the question whether an at-will employee has a cause of action for damages under the Civil Rights Act of 1871, 42 U.S.C. 1985(2) and (3), when he is dismissed from his job pursuant to a conspiracy to deter him and others from appearing or testifying in federal court or to retaliate against him for so appearing or testifying. The United States often seeks the cooperation of employees in investigations and court proceedings relating to actions that may violate federal law. A decision clarifying the protection afforded by 42 U.S.C. 1985(2) to employees who cooperate in those investigations and proceedings will likely affect the ability of the United States to obtain such cooperation in the future.

STATEMENT

1. Petitioner Michael A. Haddle has alleged that he was employed by respondent Healthmaster, Inc. (Healthmaster), from 1986 to 1995. Amended Compl. ¶ 7. Respondents Jeanette G. Garrison, Dennis Kelley, and G. Peter Molloy have all served in various capacities as officers and directors of Healthmaster. *Id.* ¶ 10.

According to petitioner's complaint, on March 8, 1995, a federal grand jury returned a 133-count indictment charging Garrison, Kelly, and Healthmaster with fraud. Amended Compl. ¶ 12. Molloy was not named in the indictment. *Id.* ¶ 13. Petitioner cooperated with federal agents in the investigation that preceded the indictment. *Id.* ¶ 14. Petitioner also appeared to testify before the grand jury, pursuant to a subpoena, although his testimony was not presented. *Ibid.* Respondents were aware of petitioner's cooperation and were aware that he would likely be a witness at the criminal trial. *Id.* ¶¶ 16, 18.

Petitioner alleged that, as a result of the indictment, the operations of Healthmaster were transferred to its wholly owned subsidiary, Healthmaster Home Health Care, Inc. (HHHC), which was placed under the protection of the bankruptcy court. The bankruptcy court barred Garrison and Kelly from any participation in HHHC. Amended Compl. ¶¶ 8, 15. Molloy became the president, and petitioner became an employee, of HHHC. *Id.* ¶¶ 8, 16.

According to petitioner's complaint, after the indictment and the transfer of Healthmaster's operations, respondents Molloy, Garrison, and Kelly agreed to bring about petitioner's termination from his new position at HHHC. Amended Compl. ¶ 18. Respondents intended this termination as "retaliation against [petitioner] for his cooperation with federal agents and his testimony under subpoena to the federal grand jury." *Ibid.* In addition, respondents intended through petitioner's termination to

intimidate petitioner and other Healthmaster employees from cooperating with federal agents or testifying in any criminal matters involving respondents. *Ibid.* At the time they made the agreement, respondents Garrison and Kelly were not employees of HHHC. *Id.* ¶ 33. Pursuant to the conspiracy, and at the direction of respondents Garrison and Kelly, Molloy caused petitioner to be terminated from his position on June 21, 1995. *Id.* ¶ 16.

2. Petitioner brought suit in the United States District Court for the Southern District of Georgia, asserting a federal claim under 42 U.S.C. 1985 and various state law claims. Section 1985, in pertinent part, prohibits conspiracies either to deter, by force, threat, or intimidation, any party or witness from attending or testifying freely, fully, and truthfully in a federal court or to injure any party or witness in his person or property because he attended or testified in federal court. See 42 U.S.C. 1985(2) (clause i).[1] The statute provides a remedy in damages to anyone who is injured in his person or property or deprived of a federal right or privilege as a result of an act in furtherance of a conspiracy prohibited under any part of Section 1985, including clause one of Section 1985(2). See 42 U.S.C. 1985(3) (clause iii).

Petitioner alleged that his employment was terminated in furtherance of respondents' conspiracy to retaliate against him for cooperating in the federal investigation and testifying before the grand jury and to deter him and others from testifying in the criminal proceedings, in violation of Section 1985(2). Amended Compl. ¶¶ 18, 20.

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[1] Because Section 1985 is complex, and we refer frequently throughout this brief to specific clauses of the statute that are not numbered in the statute as codified, we have reproduced the statute in the appendix with roman numerals added to indicate the provisions that we refer to as separate clauses. See App., *infra*, 1a-2a.

Petitioner further alleged that he was "injured in his person and property" by respondents' actions. *Id.* ¶ 21.

Respondents moved to dismiss the suit for failure to state a claim upon which relief can be granted. See Pet. App. 3a-4a. The district court granted the motion on the authority of *Morast* v. *Lance*, 807 F.2d 926 (11th Cir. 1987). Pet. App. 5a-6a. In *Morast*, the Eleventh Circuit held that an at-will employee who is dismissed pursuant to a conspiracy proscribed by 42 U.S.C. 1985(2) has no cause of action. See 807 F.2d at 930. The *Morast* court explained its holding as follows:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because Morast was an at will employee, *see* 12 U.S.C. § 24 (Fifth); O.C.G.A. § 34-7-1 (1981), he had no *constitutionally protected* interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute.

807 F.2d at 930 (emphasis added). Because petitioner conceded that he was an at-will employee, the district court ruled that *Morast* required that his Section 1985 claim be dismissed. Pet. App. 4a-6a. The district court also dismissed petitioner's state claims. *Id.* at 6a.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed in a three-sentence opinion, holding that petitioner's arguments were foreclosed by *Morast*. Pet. App. 1a-2a. The court of appeals denied petitioner's suggestion for hearing en banc. *Id.* at 2a n.1.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that petitioner must have suffered an injury to a constitutionally protected interest to maintain an action under Section 1985(2) (clause i). The statute does not require injury to a federal

interest apart from the interest in the integrity of federal judicial proceedings that is protected by the first clause of Section 1985(2) itself. Requiring injury to an independent constitutional or other federal interest conflicts with the statute's plain language and has no support in its legislative history.

Section 1985(2) (clause i) protects the integrity of federal judicial proceedings by proscribing conspiracies to deter a witness from attending or testifying in federal court or to injure a witness in his person or property for having done so. Section 1985(3) (clause iii) provides a remedy in damages to anyone "injured in his person or property" or deprived of a federal right or privilege as the result of a conspiracy proscribed by Section 1985(2) (clause i).

Petitioner alleged sufficient injury to sustain an action under those provisions. A plaintiff is "injured in his person or property" if he has suffered loss or damage of a type compensable in a common law tort action. The loss need not involve bodily injury or destruction of tangible property. Damages resulting from termination of employment, such as lost earnings, fall within the ambit of the statute.

The fact that the terminated employment was "at will" does not disqualify the resulting injuries. Section 1985(2) (clause i) grants prospective witnesses a substantive federal right to be free of conspiracies to deter or retaliate against them for their attendance at federal court proceedings. Employees do not lose their right to be free of retaliation in violation of federal law because their employment is at will under state law. This Court generally avoids interpreting federal statutes in a way that makes federal rights depend on the vagaries of state law. That principle has particular force here, because Congress enacted Section 1985 based on a belief that state authorities were unwilling or unable to preserve civil order in the South during the Reconstruction.

Respondents attempt to limit the coverage of Section 1985(2) (clause i) to actions involving force or the threat of force, but that construction is not supported by either the statute's language or its legislative history and would undermine the statute's purpose. By its terms, the statute fixes clear limits on its reach and does not require any additional limitation by judicial implication.

ARGUMENT

The district court dismissed petitioner's complaint for failure to state a claim. A reviewing court must therefore assume that the allegations in the complaint are true and may affirm the dismissal only if petitioner clearly could prove no set of facts that would entitle him to relief. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 811 (1993). In affirming the dismissal, the court of appeals held that termination of at-will employment may never cause an injury sufficient to support suit under Section 1985(2) (clause i). Pet. App. 2a. Because that conclusion rested on an erroneous interpretation of the statute, the judgment of the court of appeals must be reversed.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER HAS NO CAUSE OF ACTION UNDER SECTION 1985(2) BECAUSE HE DID NOT ALLEGE INJURY TO A CONSTITUTIONALLY PROTECTED INTEREST

The first clause of Section 1985(2), under which petitioner brought his action, provides in relevant part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or

> property on account of his having so attended or testified * * * .

42 U.S.C. 1985(2) (clause i). That clause must be read in conjunction with the third and final clause of Section 1985(3), which provides the remedy:

> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 1985(3) (clause iii).[2]

Nothing in the above language supports the holding of the court of appeals that petitioner's cause of action turns on whether he has suffered an injury to a constitutionally protected interest. Nor does the language provide any

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[2] The statutory provision codified as 42 U.S.C. 1985 was originally enacted as Section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. As originally enacted, Section 2 contained only one long paragraph. In 1874, Section 2 was reclassified as part of the consolidation and collection of all federal statutes and laws in the Revised Statutes, 18 Stat. 347. Although minor changes were made to Section 2 to accommodate the classification, Congress did not intend to change its meaning. See *Kush* v. *Rutledge*, 460 U.S. 719, 724 (1983). Except for the changes made in the consolidation, Congress has never amended Section 1985. We have reprinted the statute as originally enacted in the appendix to this brief. See App., *infra*, 3a-5a.

In addition to the prohibition at issue here, Section 1985 also prohibits conspiracies to interfere with federal officers (Section 1985(1)), equal protection in state courts (Section 1985(2) (clause ii)), private enjoyment of equal protection of the laws (Section 1985(3) (clause i)), and advocacy in federal elections (Section 1985(3) (clause ii)).

support for respondents' variation on that holding (Resp. Garrison, et al. Br. in Opp. 10-12, 13-15)—that petitioner can only maintain an action if he can show injury to a federal right or interest independent of his right to be free from a conspiracy proscribed by the statute.

Section 1985(2) (clause i) protects the strong federal interest in the integrity of federal judicial proceedings by creating a substantive right to be free from conspiracies to interfere with federal witnesses, parties and jurors. See *Kush* v. *Rutledge*, 460 U.S. 719, 724 (1983) (the statute proscribes "conspiracies that interfere with * * * the administration of justice in federal courts"); *id.* at 726 (referring to a "violation" of "rights under the first clause of § 1985(2)"); *Irizarry* v. *Quiros*, 722 F.2d 869, 872 (1st Cir. 1983). The statute does not require that the prohibited conspiracies infringe any constitutional or federal right apart from the right to participate in federal judicial proceedings that is protected by the statute itself. Indeed, in describing the proscribed conspiracies, Section 1985(2) (clause i) does not use the terms "constitutional right," "federal right" or any similar language.

Section 1985(3) (clause iii), which specifies the remedy for conspiracies proscribed by Section 1985(2) (clause i), and for conspiracies proscribed by the other provisions of Section 1985, does refer to a "right or privilege of a citizen of the United States." However, that reference refutes, rather than supports, the contention that deprivation of a federal right is a necessary element of an action for damages under the statute.

The remedy clause authorizes a cause of action for damages if the plaintiff is *either* "injured in his person or property, *or* deprived of having and exercising any right or privilege of a citizen of the United States." 42 U.S.C. 1985(3) (clause iii) (emphasis added). The use of the disjunctive makes clear that the remedy provided by the statute is not limited to situations in which a plaintiff is deprived of a federal right or privilege. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) (terms connected by a disjunctive should generally be given separate meanings). The remedy also encompasses any situation in which the plaintiff is "injured in his person or property" by a conspiracy prohibited by Section 1985(2) (clause i). And, as explained above, neither those conspiracies nor the resulting injuries necessarily entail deprivation of an independent federal right.

The court of appeals may have been misled because other provisions of Section 1985 do limit their prohibitions to conspiracies involving deprivation of an independent federal right. Those provisions—which are not aimed at protecting federal courts, officers, or elections, and are not at issue in this case—prohibit conspiracies to deny persons the "equal protection of the laws" or "equal privileges and immunities under the laws."

For example, Section 1985(3) (clause i) provides a cause of action against two or more persons who "conspire or go in disguise on the highway or on the premises of another" for the purpose of depriving persons of "equal protection of the laws" or "equal privileges and immunities under the laws." This Court has held that the equal protection language in Section 1985(3) (clause i) imposes two limitations on claims brought under that provision. First, the plaintiff must prove that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lies] behind the conspirators' action." See *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993) (quoting *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971)). Second, the equal protection language makes clear that Section 1985(3) (clause i) creates no substantive rights. The plaintiff must identify elsewhere a right to which the conspiracy sought to deny equal access. See *United Bhd. of Carpenters & Joiners* v. *Scott*, 463 U.S. 825, 833 (1983); *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442

U.S. 366, 376 (1979). See also 42 U.S.C. 1985(2) (clause ii) (prohibiting conspiracies to deny equal protection by interfering with state courts).

The provisions of Section 1985 that prohibit conspiracies to interfere with federal courts, officers and elections, however, do not contain equal protection language. See *Kush*, 460 U.S. at 724-725. The absence of that language is not an accident. As the Court explained in *Kush*, the sponsors inserted the equal protection language into selected portions of the Civil Rights Act of 1871 (such as Section 1985(3) (clause i)) in order to address constitutional objections that the "enormous sweep of the original language" improperly extended federal authority and displaced state control over private conduct. See *Kush*, 460 U.S. at 726 (quoting *Griffin*, 403 U.S. at 99-100); see also Cong. Globe, 42d Cong., 1st Sess. H. 477 (1871) (Rep. Shellabarger); *id.* at H. 485 (Rep. Cook). Congress included equal protection language to make clear that private conduct that did not directly threaten federal interests would be proscribed only when it was aimed at rights that were otherwise protected by federal law.

The legislative concern that motivated the limitation on Section 1985(3) (clause i) does not apply to the portions of Section 1985 that prohibit interference with federal courts, officers and elections. *Kush*, 460 U.S. at 726. Neither opponents nor proponents of the bill questioned Congress's authority to prohibit interference with witnesses, parties and jurors in the federal courts. See *Kush*, 460 U.S. at 727 (citing Cong. Globe, 42d Cong., 1st Sess. H. 486 (1871) (Rep. Cook); *id.* at S. app. 220 (Sen. Thurman)). That interference necessarily implicates federal interests, and the limiting language was therefore deemed unnecessary. See *Kush*, 460 U.S. at 725; see also *McCord* v. *Bailey*, 636 F.2d 606, 616 (D.C. Cir. 1980) (Section 1985 requires "violations of an explicit federal interest" for "obstruction of justice in state courts," but, for "acts

interfering with the operation of federal courts, no limitation was made"), cert. denied, 451 U.S. 983 (1981).

In requiring that the plaintiff show an injury to a separate constitutional interest in his employment, the Eleventh Circuit improperly imported the requirements of Section 1985(3) (clause i) into Section 1985(2) (clause i) and ignored important differences in the language and purposes of the two provisions. This Court rejected that approach in *Kush*, *supra*. In that case, the Court held that the district court improperly required a plaintiff suing under Section 1985(2) (clause i) to prove that the conduct he challenged was motivated by racial or other class-based animus, proof that would have been required in a suit under Section 1985(3) (clause i). The Court explained that the textual basis for the race or class-based animus requirement—the equal protection language in Section 1985(3) (clause i)—does not appear in Section 1985(2) (clause i). *Kush*, 460 U.S. at 724-725. The reasoning in *Kush* applies with equal force here.

II. PETITIONER ALLEGED SUFFICIENT INJURY TO MAINTAIN AN ACTION UNDER SECTION 1985(2) BY ALLEGING THAT HE WAS "INJURED IN HIS PERSON OR PROPERTY" BY THE TERMINATION OF HIS EMPLOYMENT

Petitioner's allegation that he was "injured in his person or property" by the termination of his employment in furtherance of a conspiracy proscribed by Section 1985(2) (clause i) is sufficient to support his cause of action. A plaintiff is "injured in person or property" within the meaning of the statute if he suffers any loss or damage of a type compensable in a tort suit at common law. Damages such as lost earnings that result from termination of employment fall clearly within the ambit of the statute. The fact that the terminated employment was "at will" does

not disqualify the resulting harm from being an "injur[y] in person or property."

A. A Plaintiff Is Injured In His Person Or Property If He Suffers Loss Or Damage Of A Type Compensable In Tort

The statute provides a remedy in damages to anyone who has been "injured in his person or property" as a result of an act in furtherance of a conspiracy proscribed by Section 1985(2) (clause i). As several courts of appeals have recognized, the requirement of "injury" to "person or property" demands only that a plaintiff have suffered some loss or damage of the type compensable in a tort suit at common law. See *Irizarry*, 722 F.2d at 871 (term "property" in Section 1985 "must include any economic damage that would be recognized in an ordinary tort suit"); accord *Portman* v. *County of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993).

At the time Congress enacted the Civil Rights Act of 1871, the term "injured" had much the same meaning that it has today: harmed, hurt, or damaged in any way. A leading dictionary of the day offered the following definitions: "To do harm to; to impair the excellence and value of; to hurt; to damage." N. Webster, *An American Dictionary of the English Language* 694 (rev. ed. 1870).[3] That dictionary went on to explain that "injure" was "used in a variety of senses," including:

> (a.) To hurt or wound, as the person; to impair soundness, as of health. (b.) To damage or lessen the value of, as goods or estate. (c.) To slander, tarnish, or impair, as reputation or character. (d.) To impair or diminish, as happiness. (e.) To give pain to, as the sensibilities or the feelings; to grieve; to annoy. (f.) To impair, as the intellect or mind.

[3] Similarly, today "injure" is broadly defined as "to do or cause harm or any kind to; damage; hurt; impair." *Random House Dictionary of the English Language* 983 (2d ed. 1987 unabridged). The dictionary adds that "INJURE is a general term referring to any kind or degree of damage." *Ibid*.

Ibid. The first edition of Black's Law Dictionary also broadly defined injury as "[a]ny wrong or damage done to another." *Black's Law Dictionary* (1st ed. 1891).[4]

[4] The term "injury" has also sometimes been used to signify damage caused by the violation of a legal right. See, *e.g.*, 1 B.V. Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 612 (1879); A. M. Burrill, *A Law Dictionary and Glossary* 79 (2d ed. 1867). It is unlikely, however, that Congress used the word "injured" in the remedy clause of Section 1985 to require not only actual harm or damage but also the violation of a right under state or federal law separate and apart from the right protected by Section 1985(2) (clause i) itself. First, the remedy clause becomes relevant only after a plaintiff establishes violation of a right provided in one of the substantive clauses of Section 1985. Requiring an additional violation would be redundant. Second, as discussed at p. 23, *infra*, the historical context in which Congress enacted Section 1985 suggests that Congress did not intend the remedy for violations of the statute to depend on state law.

Moreover, it is a fundamental canon of statutory interpretation that words should be given their ordinary, contemporary, common meaning. See, *e.g.*, *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The legal dictionaries of the late nineteenth century recognized that "[i]n ordinary language," injury "means any loss." Abbott, *supra*; see also Burrill, *supra* ("In ordinary language, this word has effectually usurped the meaning of *damnum*, (damage.)"). Both legal dictionaries and courts of the time commonly used "injury" to signify a harm that might or might not violate a legal right or give rise to a remedy. See, *e.g.*, 1 J. Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 636 (11th ed. 1862) ("There are many injuries for which the law affords no remedy."); *Sanderson* v. *Hunt*, 76 S.W. 179 (Ky. 1903) ("An injury to one's person may be done in a number of ways. For example, it may be done to some member of his body, it may be to his state or peace of mind * * * . The law may not allow a recovery for all such injuries.").

The statute also requires that the harm or damage a plaintiff suffers be "in his person or property." At the time that Section 1985 was enacted, that phrase broadly encompassed all harms compensable in a tort suit. Blackstone used the phrase to distinguish actions in tort from actions in contract:

> Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs.
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> * * * * *
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> Of the former nature are all actions upon debts or promises; of the latter are all actions for trespasses, nuisances, assaults, defamatory words, and the like.

4 *Blackstone's Commentaries* 117 (Tucker ed. 1803). Blackstone distinguished generally between rights of person and rights of property, which he referred to as "rights of things." The former are rights that the individual obtains by virtue of his personhood. The latter are rights that the individual obtains through his possession or ownership of property. See *id.*, Vol. 2, at 122; *id.*, Vol. 3, at 1. As the Georgia Supreme Court noted in summarizing the classifications used by Blackstone and others:

> At common law, absolute personal rights were divided into personal security, personal liberty, and private property.
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> * * * * *
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> No provision has been made for any middle class of injuries between those to person and those to property, and the great body of wrongs arrange themselves under the one head or the other.

Johnson v. *Bradstreet Co.*, 13 S.E. 250 (Ga. 1891); accord *Hoover* v. *Palmer*, 80 N.C. 313, 314 (1879); *Thompson* v. *Judy*, 169 F. 553, 555-556 (6th Cir. 1909). See also 1 J. Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 636 (11th ed. 1862) (noting that legal injuries can be divided into injuries to person and injuries to personal and real property); Md. Const. of 1867, Art. 19, Declaration of Rights (dividing injuries for which the law ought to provide a remedy into injuries to "person" and "property"). In essence, every type of damage for which the courts may provide compensation in a tort suit may be classified as an injury either to a person or to his property.

B. Injury In Person Or Property Is Not Limited To Bodily Injury and Damage to Tangible Property

Respondents' suggestion (Resp. Garrison, et al. Br. in Opp. 18-19) that "injur[y] in person or property" embraces only bodily injuries or destruction of tangible property is untenable. Respondents' argument is contradicted by numerous court decisions confirming that "injuries to the person" encompass non-physical harms and "injuries to property" include various monetary losses. Moreover, the construction of the phrase proposed by respondents would frustrate the purpose of the statute.

1. Courts in the nineteenth and early twentieth century routinely ruled that tort actions complaining of adultery,[5] seduction of a minor,[6] alienation of spousal affec-

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[5] See, *e.g.*, *Tinker* v. *Colwell*, 193 U.S. 473 (1904); *Garrison* v. *Burden*, 40 Ala. 513, 515-516 (1867).

[6] See, *e.g.*, *Hoover* v. *Palmer*, 80 N.C. at 314-315; *In re Freche*, 109 F. 620, 620-621 (D. N.J. 1901); *In re Maples*, 105 F. 919 (D. Montana 1901).

tions,[7] breach of promise of marriage,[8] defamation,[9] malicious prosecution[10] and legal malpractice[11] should be considered actions for "injuries to the person," even though they involved no bodily injury.[12] Those courts reasoned that injuries such as mental anguish, injury to reputation, and other intangible harms are properly classed as injuries to the person. See, *e.g.*, *McDonald* v. *Brown*, 51 A. 213, 214 (R.I. 1902); *Wade* v. *Kalbfleish*, 58 N.Y. 282, 285 (1874).[13]

Similarly, "injury to property" has long been construed to include monetary losses, not simply the destruction of tangible property. Thus, this Court has held that con-

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[7] See, *e.g.*, *Leicester* v. *Hoadley*, 71 P. 318, 320 (Kan. 1903).

[8] See, *e.g.*, *Wade* v. *Kalbfleish*, 58 N.Y. 282, 287 (1874); *Zabriskie* v. *Smith*, 13 N.Y. 322, 333 (1855).

[9] See, *e.g.*, *Times-Democrat Pub. Co.* v. *Mozee*, 136 F. 761, 763 (5th Cir. 1905); *McDonald* v. *Brown*, 51 A. 213, 214 (R.I. 1902); *Hutcherson* v. *Durden*, 39 S.E. 495 (Ga. 1901); *Johnson*, *supra*; *Thompson*, *supra*.

[10] See, *e.g.*, *McChristal* v. *Clisbee*, 76 N.E. 511 (Mass. 1906).

[11] See, *e.g.*, *Zabriskie* v. *Smith*, 13 N.Y. 322, 333 (1855).

[12] Courts have construed the term more narrowly only when they have found a clear legislative purpose to limit the application of the relevant statute. See, *e.g.*, *Engelking* v. *Von Wamel*, 26 Tex. 469, 470-471 (1863) (slander is not an injury to the person within the jurisdiction of justices of the peace); *Smith* v. *Sherman*, 58 Mass. 408, 413 (1849) (nonphysical injuries are not "damage to person" for which an action survives the death of the victim); *Ward* v. *Blackwood*, 41 Ark. 295, 299 (1883) (relying on *Smith*). A narrow construction is inappropriate here, because there is no indication that Congress intended a meaning more limited than the ordinary meaning. As this Court has counseled, the Reconstruction civil rights acts should be "accord[ed] a sweep as broad as [their] language." *United States* v. *Price*, 383 U.S. 787, 801 (1966).

[13] Not all intangible harms were compensable at common law. The traditional rule was that mental injury was not compensable unless it was real. Mere annoyance, vexation, or inconvenience could not support an award of damages. See, *e.g.*, T. Sedgwick, *A Treatise on the Measure of Damages* § 46a, at 74-75 (9th ed. 1912).

sumers who allegedly paid higher prices as a result of anti-competitive activity had suffered an injury to property within the meaning of the Clayton Act. *Reiter*, 442 U.S. at 339. Similarly, this Court has also held that conversion is an injury to property within the meaning of the Bankruptcy Act. *McIntyre* v. *Kavanaugh*, 242 U.S. 138, 141 (1916). See also *Crawford* v. *Johnson*, 6 F. Cas. 777, 778 (Cir. Ct. D. Ore. 1868) (No. 3369) (debt arising from embezzlement of funds is an injury to property). As this Court noted in *Reiter*, "the word 'property' has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage, 'property' comprehends anything of material value owned or possessed. Money, of course, is a form of property." 442 U.S. at 338 (citation omitted).

2. Restricting Section 1985(2) to injuries involving bodily harm or destruction of tangible property would deny full effect to Congress's purpose in enacting the statute. Congress passed the Civil Rights Act of 1871 (popularly known as the Ku Klux Klan Act) in response to widespread lawless activity and resistance to federal authority in the South. Although that lawlessness and resistance to authority often involved bodily harm or physical destruction of property, it was also manifested in other ways.

Members of Congress were concerned that perjury, jury nullification, witness intimidation, and other abuses were rendering the state court justice system ineffective.[14] Few

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[14] Representative Coburn's colorful language accurately conveys the view of many Members:

> The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress.

Cong. Globe, 42d Cong., 1st Sess. H. 459 (1871). See also *id.* at S. 158 (Sen. Sherman); *id.* at H. 320-321 (Rep. Stoughton); *id.* at S. app. 252 (Senator Morton); *id.* at H. 437 (Rep. Cobb); *id.* at H. 481 (Rep. Wilson of Indiana); *id.* at S. 654 (Sen. Osborn).

perpetrators were being convicted, even when the evidence of their guilt was clear.[15] Members of the Ku Klux Klan and their sympathizers were expected to give perjured testimony to exonerate Klan members who were accused of a crime. If selected to be on the jury, Klan members were expected to acquit, regardless of the strength of the evidence.[16]

In response to those problems, Congress enacted Section 1985(2) to protect witnesses, parties and jurors in federal courts from intimidation and retaliation. See Cong. Globe, 42d Cong., 1st Sess. S. 567 (1871) (Senator Edmunds). Congress framed the language of the statute broadly, to address the breadth of the problem it confronted. Those Members who discussed the provision at issue in this case also described it in broad terms. See *id.* at H. 486 (Rep. Cook) ("Now, if there be any combination of men who shall combine and conspire together for the purpose of preventing * * * a witness from testifying in a court of the United States * * * or to punish a witness for testifying truthfully, that combination is an offence against the United States."); *id.* at S. 568 (1871) (Senator Edmunds) (Section 2 "gives a civil action to anybody who shall be injured by the conspiracy."). Thus, the statutory language as well as its purpose refute any contention that "injur[y] in person or property" is limited to physical harm.

C. Loss of At-Will Employment Entails Injury In Person Or Property

1. Damages caused by the termination of employment are "injur[y] in person or property" within the meaning of

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[15] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. H. 374 (1871) (Rep. Lowe); *id.* at S. 505 (Senator Pratt); *id.* at S. 608 (Sen. Edmunds).

[16] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. S. 158 (1871) (Sen. Sherman); *id.* at H. 320-321 (Rep. Stoughton); *id.* at S. app. 252 (Sen. Morton).

Section 1985(3) (clause iii). Termination of employment results in monetary losses such as lost wages and lost benefits. Usually, the terminated employee also incurs expenses to find substitute employment. Loss of employment may also give rise to intangible injuries such as emotional distress, loss of self-esteem, and diminished professional reputation.

All of those harms were routinely compensated in tort actions in the second half of the nineteenth century. See, *e.g.*, *Beckwith* v. *Bean*, 98 U.S. 266, 276 (1878) (damages may include "direct expenses incurred by the injured party, his loss of time, his bodily sufferings, under some circumstances his mental agony, his loss of reputation, the degree of indignity involved in the wrong done, and the consequent public disgrace attending the injury"); *Harris* v. *Union Pacific R.*, 13 F. 591, 592, 594 (Cir. Ct. D. Col. 1882) (McCrary, C. J.) (allowing damages for loss of wages based on plaintiff's claim that he was "injured in his person" by defendant's negligence). Courts in the early twentieth century readily concluded that harms caused by loss of employment were injuries to person or property.[17] And courts today continue to hold that loss of employment results in injuries to person[18] and property.[19]

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[17] See, *e.g.*, *Scott* v. *Prudential Outfitting Co.*, 155 N.Y.S. 497, 499 (N.Y. App. Term 1915) (at-will employment); *People* v. *Warden*, 130 N.Y.S. 698 App. Div.), affirmed, 99 N.E. 1116 (N.Y. 1912); *State* v. *Kramer*, 115 A. 8, 11 (Del. Ct. of Gen. Sess. 1921).

[18] *Baab* v. *AMR Serv. Corp.*, 811 F. Supp. 1246, 1262 (N.D. Ohio 1993) (emotional distress arising out of constructive discharge is injury to the person); *Stringer* v. *Sparrow Hosp.*, 233 N.W.2d 698 (Mich. Ct. App. 1975) (wrongful loss of employment causes injury to the person). Cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661-662 (1987) (employment discrimination claims under 42 U.S.C. 1981 are analogous to claims for personal injuries for purposes of borrowing state statute of limitations); *Wilson* v. *Garcia*, 471 U.S. 261, 277, 280 (1985) (same with respect to claims under Section 1983). It is also worth noting that

Respondents contend (Resp. Garrison, et al. Br. in Opp. 19) that the 1871 Congress never expressly contemplated that the statute would apply to retaliatory discharges. As this Court has noted, however, the fact that a statute applies "in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 118 S. Ct. 1952, 1956 (1998). Congress could have chosen to limit the language of its corrective legislation to the southern States, to the Ku Klux Klan, or to the precise types of outrages persons had testified were occurring in 1871. Legislation, however, often addresses specific problems in more general ways. See *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1335 (7th Cir.), cert. denied, 434 U.S. 975 (1977). And it cannot be doubted that intimidating witnesses by discharging employees who testify in federal court proceedings threatens corruption of the judicial process of the type Congress feared when it enacted Section 1985(2).

Congress in 1871 saw the problem of witness intimidation and retaliation as a severe threat to the administration of justice in the federal courts, and it enacted Section 1985(2) to address that problem. The methods of witness intimidation most prevalent today may or may not be the same as those in common use in 1871, but Congress used

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Westlaw's keynote system categorizes loss of earnings as injury to the person. See Westlaw 115k99.

[19] See, *e.g.*, *Portman*, 995 F.2d at 909 (termination of at-will employment results in injury to property under Section 1985); *Irizarry*, 722 F.2d at 871 (refusal to rehire causes injury to property under Section 1985(2)); *Troy* v. *Interfinancial, Inc.*, 320 S.E. 2d 872, 877 (Ga. Ct. App. 1984) ("an employee, generally, has a property right in his contract of employment (written or verbal) (even if it is at the will of the employer) which may not be unlawfully interfered with by another"); *State* v. *Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) (threat of loss of employment is threat of injury to property).

language broad enough to reach the wide variety of methods by which witnesses can be subjected to intimidation and retaliation, including methods that it may not have contemplated at the time. That broad language must be respected. See *Brogan* v. *United States*, 118 S. Ct. 805, 809 (1998).

2. The fact that petitioner was employed "at will" does not mean he could not be "injured in person or property" by the termination of his employment. As a general matter, an employee does not forfeit his rights under federal law because his employment is at will under state law. As one Georgia court noted in explaining the interaction between the doctrine of at-will employment and federal statutes, "an at-will employee whose employment is 'wrongfully' terminated in violation of the public policy that is established by specific state or federal statutes may pursue his applicable statutory remedy without being barred by the proposition that an employer otherwise incurs no liability for discharging an at-will employee." *Borden* v. *Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990). At-will status simply means that an employee may be discharged for any reason that does not violate state or federal law. It does not mean that an employer, or others, may ignore state and federal protections extended to the employee.[20]

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[20] Nor can respondents credibly suggest that an at-will employee whose employment has been terminated in violation of federal law nonetheless suffers no harm because the employee could, theoretically, have been discharged for other reasons. At-will employees discharged for reasons that violate federal law may recover the economic damages sustained because of the wrongful discharge. See, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 277 (1977). The defendant may attempt to prove that the employee would have been discharged in any event for lawful reasons, but that fact must be proved. See *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 362-363 (1995); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 252-253 (1989)

This Court has consistently affirmed that principle. For example, public employees who are discharged in retaliation for exercising their First Amendment rights may have a valid cause of action under 42 U.S.C. 1983 (1994 & Supp. II 1996), even if they are defined as at-will employees under state law. See *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 283-284 (1977). Government contractors enjoy similar protection, even if their contracts are terminable or non-renewable at-will. *See Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 684-685 (1996). Similarly, the courts of appeals have uniformly held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, protects at-will employees from discriminatory discharge. See, *e.g.*, *Mardell* v. *Harleysville Life Ins. Co.*, 31 F.3d 1221, 1233 (3d Cir. 1994), vacated on other grounds, 514 U.S. 1034 (1995); *Washington* v. *Lake County*, 969 F.2d 250, 256 (7th Cir. 1992). So too, Section 1985(2) (clause i) protects at-will employees from discharge to prevent or to retaliate against them for the exercise of the right to be a federal witness.[21]

(plurality opinion); *id.* at 260 (White, J. concurring in judgment); *id.* at 261 (O'Connor, J., concurring in judgment); *Mt. Healthy*, 429 U.S. at 287. The trier of fact may not simply assume that, because an employee could have been fired for other reasons, that necessarily would have happened. Proving that the same decision would have been justified is not equivalent to proving that the same decision would have been made. See *McKennon*, 513 U.S. at 360.

[21] Respondents' reliance on *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Bishop* v. *Wood*, 426 U.S. 341 (1976), is misplaced. Those decisions concern the property interest that a public employee must demonstrate in his or her job in order to invoke the Constitution's protection of procedural due process. Because a cause of action under Section 1985(2) (clause i) does not require injury to a constitutionally protected interest, see pp. 6-11, *supra*, whether petitioner has been deprived of property within the meaning of the Due Process Clause is not relevant to his claim under the statute. Nothing in *Roth* or *Bishop* suggests that a person who lacks a property interest protected by procedural due process because his employment is at will is thereby deprived of compensation for injuries that he sustains when his employment is terminated in violation of federal law. Indeed, this Court has held to the contrary. See note 20, *supra*; *Mt. Healthy*, 429 U.S. at 277, 283-284.

Exempting at-will employees from the protection of Section 1985(2) would make the vindication of important federal interests depend on the vagaries of state law. This Court avoids that result if possible whenever Congress has created a federal statutory right, because "federal statutes are generally intended to have uniform nationwide application." See *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989).

A conclusion that the rights created by Section 1985(2) turn on state law would be particularly inappropriate. Congress enacted the Civil Rights Act of 1871 precisely because it believed that a federal solution was necessary to the disorder and anarchy that plagued the southern United States at that time. Many Members of Congress expressed concern that state authorities were unwilling or unable to act effectively to prevent unlawful conduct. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. S. 158 (1871) (Sen. Sherman); *id.* at H. 320-321 (Rep. Stoughton); *id.* at S. app. 109 (Sen. Pool); *id.* at H. 394 (Rep. Rainey); *id.* at S. app. 252 (Senator Morton). For example, one Member of Congress noted an incident in Florida in which a Florida court had ruled that Florida law provided no remedy for victims whose home had been invaded by armed men. See *id.* at H. 447 (Rep. Butler). Given the congressional skepticism about state authorities and processes that prompted enactment of Section 1985(2), this Court should not impute to Congress the intent to make the statute's protection depend on the very state law mechanisms that Congress found inadequate in the first place.

III. THE ALTERNATIVE GROUNDS FOR AFFIRMANCE PROFFERED BY RESPONDENTS LACK MERIT

A. Section 1985(2) Is Not Limited To Conduct Involving Force Or The Threat Of Force

Contrary to respondents' suggestion (Garrison, et al. Br. in Opp. 23-25), Section 1985(2) is not limited to conspiracies that involve force or the threat of force. The limitation advocated by respondents is unsupported by the statute's language and legislative history, would undermine the statute's purpose, and has not been adopted by the courts of appeals.

Respondents attempt to ground a requirement of force or the threat of force in the statutory provision that proscribes conspiracies to deter testimony by "force, intimidation, or threat." 42 U.S.C. 1985(2) (clause i). However, "force" is only one of the three alternate means of deterrence prohibited by the statute. Neither "intimidation" nor "threat" requires force or threat of force.

In 1871, "intimidation" included any action that reasonably inspires fear in another.[22] See N. Webster, *supra*, at 710 (defining "intimidate" as "to make timid or fearful; to inspire with fear; to dishearten; to abash."). At that time, courts frequently used the words "intimidate" or "intimidation" to refer to actions that did not involve the use or threat of force, but involved economic coercion. See, *e.g.*, *United States* v. *Castillero*, 67 U.S. (2 Black) 17, 91 (1863) (threat to expose legal documents); *Mendenhall*

[22] The word has virtually the same meaning today. See *Random House Dictionary of the English Language* 1000 (2d ed. 1987 unabridged) (defining "intimidate" to mean: "1. To make timid; fill with fear; 2. To overawe or cow, as through the force of personality or by superior display of wealth, talent; 3. To force into or deter from some action by inducing fear; to intimidate a voter into staying away from the polls.").

v. *Carter*, 17 F. Cas. 12, 14 (W.D.N.C. 1872) (No. 9426) (threat to file proceedings in bankruptcy court); *Pitzer* v. *Russell*, 4 Or. 124, 127 (1871) (accumulation of costs in legal proceedings). In the ensuing decades, a number of courts held explicitly that statutes proscribing "intimidation" were not limited to actions involving the use or threat of force but also applied to economic coercion. See, *e.g.*, *Vegelahn* v. *Guntner*, 44 N.E. 1077 (Mass. 1896) (intimidation not limited to threats of violence or physical injury); *Baldwin* v. *Escanaba Dealer's Ass'n*, 130 N.W. 214, 219 (Mich. 1911) (same); *Lohse Patent Door Co.* v. *Fuelle*, 114 S.W. 997, 1004 (Mo. 1908) (same); *Barr* v. *Essex Trades Council*, 30 A. 881, 888 (N.J. Ch. 1894) (same).[23]

The term "threat" is also not limited to threat of force or violence. See N. Webster, *supra*, at 1378 (defining threat as "denunciation of ill; declaration of an intention or determination to inflict punishment, loss, or pain on another; a menace"); *Random House Dictionary of the English Language* 1975 (2d ed. 1987 unabridged).

In any event, the statute prohibits not only conspiracies to deter participation in federal court proceedings by "force, intimidation, or threat" but also conspiracies to injure a person "in his person or property" on account of the person's testifying in or attending federal court. As explained above, injury to person or property need not necessarily result from the use or threat of force. See pp. 15-17, *supra*.

When Congress has wanted to limit the reach of a statute proscribing interference with federally protected

[23] Indeed, this Court has recognized, in a different context, that termination of employment may constitute a means of intimidation. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-47 (1937) (National Labor Relations Act prohibits employers from discharging employees in order to "intimidate or coerce [them] with respect to their self-organization and representation").

rights to actions involving "force or threat of force," it has done so expressly. See, *e.g.*, 18 U.S.C. 245(b) (interference with federally protected activities); 18 U.S.C. 248(a)(1)-(3) (access to clinic entrances); 42 U.S.C. 3631 (interference with fair housing rights). Indeed, another provision of Section 2 of the Civil Rights Act of 1871 prohibited a conspiracy "by *force* to seize, take, or possess any property of the United States contrary to the authority thereof." 17 Stat. 13 (emphasis added). The absence of any such limitation in Section 1985(2) (clause i) strongly indicates that Congress did not intend to limit the statute's prohibition to actions involving force or the threat of force.

The legislative history of the proposed Sherman Amendment to the Civil Rights Act of 1871 supports that conclusion. The Sherman Amendment, which was approved by the Senate, would have made cities, counties, and parishes liable for certain injuries caused by mob violence. Unlike most other provisions of the Civil Rights Act of 1871, the Sherman Amendment would have applied only to actions that resulted in the destruction of tangible property or bodily injury by "force and violence."[24] See Cong.

[24] The Sherman Amendment provided in relevant part:

> That if any house tenement, cabin, shop, buildings, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with *force and violence* be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case, the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead.

Cong. Globe, 42d Cong., 1st Sess. S. 755 (1871) (emphasis added).

Globe, 42d Cong., 1st Sess. S. 755 (1871). The Sherman Amendment was not approved by the House, and the final bill eliminated it in favor of a different provision that was ultimately codified at 42 U.S.C. 1986. See *id.* at H. 804. The language of the Sherman Amendment, however, illustrates that when legislators in 1871 wanted to reach only conduct that involved "force and violence" and destruction of tangible property, they thought it feasible and necessary to state that limitation expressly. Congress could have included similar language in Section 1985(2) had it intended to limit that Section to acts involving force or threat of force, and it did not do so.

Limiting the reach of the statute to intimidation or retaliation that involves force or the threat of force would frustrate the statute's broad purpose. As described above, Congress's concerns in passing Section 1985 were not limited to curbing violence. Congress was also concerned with the corruption of the state judicial system through such non-violent means as jury nullification and perjury by persons who were sympathetic to the lawless conduct of the Ku Klux Klan. See pp. 17-18, *supra*. The threat of terminating employment and other acts of economic coercion are just as likely to foster the corruption of the judicial process that Congress sought to eliminate as the threat of violence.

It is thus not surprising that no court of appeals has endorsed respondents' crabbed viewed of the protection afforded by Section 1985(2) (clause i). The courts of appeals have sustained actions under the statute based on a variety of conspiracies that did not involve force or the threat of force. See, *e.g.*, *Irizarry*, *supra* (failure to rehire); *Portman*, *supra* (retaliatory discharge); *Wright* v. *No*

Skitter, Inc., 774 F.2d 422 (10th Cir. 1985) (conspiracy to defeat low bidder on contract); *McCord*, *supra* (misconduct by attorney); cf. *Windsor* v. *The Tennessean*, 719 F.2d 155 (6th Cir.) (defamation causes injury sufficient to support action under Section 1985(1)), cert. denied, 469 U.S. 826 (1984); *Stern*, *supra* (same).[25]

B. Limiting Section 1985(2) Is Not Necessary To Avoid Creating A General Federal Tort Law

Respondents' suggestion (Resp. Garrison, et al. Br. in Opp. 15) that Section 1985(2) (clause i) must be given a narrow interpretation to avoid creating an open-ended federal tort law has already been rejected by this Court. As the Court explained in *Kush*, 460 U.S. at 726, the concerns that caused Congress to narrow the scope of Section 1985(3) (clause i) are not implicated by Section 1985(2) (clause i). See p. 10, *supra*. Because 1985(2) (clause i) makes actionable only conspiracies to interfere with the federal courts, there is no danger of federalizing tort law. See *Kush*, 460 U.S. at 723, 726. Nor is there any need to constrain the scope of the statute to avoid doubts about Congress's authority to enact the provision. See *Kush*, 460 U.S. at 727; *McCord*, 636 F.2d at 614 n.12, 617.

Section 1985(2) (clause i) does not prohibit all interference with the federal courts. First, the statute reaches only conspiracies and does not cover unilateral ac-

[25] Even the Eleventh Circuit in *Morast* v. *Lance*, 807 F.2d 926, 930 (1987), did not hold that the statute only proscribes conspiracies involving force or threat of force. The court of appeals did hold, however, that allegations of "anger and vindictiveness, extensive questioning regarding leaks to the press, exclusion from board meetings, and a decreased workload" do not constitute "force, intimidation, or threat." Judge Meskill of the Second Circuit has suggested that the phrase "force, intimidation, or threat" should be read to "require evidence of physical force, threats of violence, or similarly malevolent acts," *Keating* v. *Carey*, 706 F.2d 377, 392 (2d Cir. 1983) (Meskill, J., dissenting), but the Second Circuit has not adopted that view.

tion. See *Irizarry*, 722 F.2d at 872.[26] Second, the statute requires proof that the purpose of the conspiracy was improper—either to deter someone from participating in federal court proceedings or to injure someone in retaliation for his participation. Proof of the required motive will ordinarily be difficult unless the injury or threatened injury posed by the alleged conspiracy is sufficiently severe that a reasonable person would feel compelled not to attend court or to testify untruthfully. Finally, the plaintiff must establish either the deprivation of a federal right or privilege, or damage of a type compensable in a common law tort suit. See pp. 12-17 & note 13, *supra*.

The alleged conspiracy in this case falls squarely within the prohibition of the statute. Conspiracies to discharge employees in retaliation for testifying truthfully in federal court present precisely the type of threat to the integrity of federal judicial proceedings that Section 1985 was intended to address. The loss of earnings suffered by petitioner as a result of the termination of his employment is a concrete, economic harm of the type routinely compensated at common law and is substantial enough to support an action under the statute.[27]

[26] One potential issue in some retaliatory discharge cases under Section 1985(2) is whether the intra-corporate conspiracy doctrine, which holds that employees of a single entity cannot conspire with each other, applies to claims brought under the statute. This Court has never addressed that question. See *Hull* v. *Schuck*, 501 U.S. 1261 (1991) (White, J. dissenting from the denial of the petition for certiorari). Respondents did not raise that issue in the court of appeals, and it is not encompassed in the question presented by the petition for certiorari. In any event, in this case, the alleged conspirators were not all employed by the same corporation at the time of the alleged conspiracy, so the doctrine would not be applicable. See *Irizarry*, 722 F.2d at 872.

[27] Respondents also urge affirmance on two grounds that are not fairly included in the question presented by the petition for certiorari, that were not passed on by the district court or court of appeals, and

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed, and the case remanded with instructions to reinstate the complaint.

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that are, in any event, without merit. First, respondents suggest that Section 1985(2) (clause i) provides a remedy in damages only for parties to litigation. Although the remedy clause (Section 1985(3) (clause iii)) uses the term "party" when it describes who may sue for damages under the statute, that term is used as a synonym for "person" and is not intended to restrict actions for damages to parties to a court proceeding. See *Brever* v. *Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 & n.7 (10th Cir. 1994). Because the remedy clause applies to actions based on all the conspiracies prohibited by Section 1985, most of which do not even involve court proceedings, reading "party" as limited to a party to a judicial proceeding would vitiate the statute. In fact, as enacted, the statute used the word "person" rather than "party." See 17 Stat. 14 (reprinted at App., *infra*, 5a). The substitution of the term "party" occurred when all federal statutes were consolidated in the Revised Statutes, and as explained at note 2, *supra*, the consolidation was not intended to change the meaning of the statutes.

Respondents' second contention—that Section 1985(2) (clause i) is only implicated when a witness actually testifies in court—conflicts with the plain statutory language, which prohibits retaliation against a witness who has "attended or testified." 42 U.S.C 1985(2) (clause i). Moreover, respondents' limitation on the statute would frustrate its purpose by depriving plaintiffs of a cause of action whenever a conspiracy to deter testimony is successful. See *Chahal* v. *Paine Webber, Inc.*, 725 F.2d 20, 24 (2d Cir. 1984).

Respectfully submitted.

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JULY 1998

APPENDIX

1. Section 1985 of Title 42, United States Code, provides:

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

[Clause i] If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; **[Clause ii]** or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the

due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

[Clause i] If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; **[Clause ii]** or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; **[Clause iii]** in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

2. Section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, provides:

That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States, contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to

by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or Supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall

determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right to privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."